IN THE HIGH COURT OF UTTARANCHAL AT

NAINITAL

FIRST APPEAL No. 1092 OF 2001

M/s Dayal Construction Co.
129/5 Tallital, Nainital. ---------Appellant.

Vs.

Union of India through
Secretaryand others. --------Respondents.

Hon'ble Rajesh Tandon, J.

Heard Sh. S.S. Yadav, learned counsel for the appellant and Sh. V.B.S. Negi, S.C. (Central Govt.) Union of India

By the present writ petition the petitioner has prayed for quashing the order dated 20.10.2001 passed by learned District Judge in Civil Misc. case no. 3/2000 by which the application under Section 5/14 of Limitation Act 1963 for condonation of delay in moving the petition under Section 34 of Arbitration and Conciliation Act 1996 has been rejected.

Briefly stated the petition under Section 34 of Arbitration and Conciliation Act 1996 was filed on 1.11.1999 before Civil Judge (Sr. Div.) at Nainital for setting aside the award dated 30.07.1999 delivered by Sole Arbitrator regarding construction work of 5 Type-II, 4 Type-III and one Type-IVth staff quarters in Telecom, Haldwani thereby dismissing the claim of the contractor. The initial application was filed before the Civil Court of original jurisdiction by which he has directed for the return of the plaint before the competent court and the

petitioner after receiving back his petition on 8.9.2000 presented the same before the Court on the very day.

Sec. 34 (3) of the Arbitration Act provides a limitation of 3 months from the date on which the party file the application after receiving the award. In the present writ petition the award was received by the applicant on 5.8.1999 hence the applicant has filed an application along with the affidavit under Section 5/14 of the Limitation Act paper no. 18C along with affidavit 19C.

Court below has held that the provisions of the Limitation Act are not attracted in the present case so as to exclude the period of limitation between 4.11.1999 to 14.7.2000. The petition was presented on 8.9.2000 when it was received back by the petitioner.

Court below has come to the conclusion that on 14.7.2000, the learned civil judge has returned petition for presentation before the proper court and the petition was received back on 8.9.2000 and it was presented on the same day. If the limitation is taken into consideration from 4.11.1999, the order which was passed on 14.7.2000 itself was beyond the statutory period of limitation.

The order passed by learned Civil Judge on 14.7.2000 itself shows that it was beyond the statutory period of 3 months and therefore the petitioner can not be said to be at fault as before 14.7.2000 or 8.9.2000 when the petition was taken back it could not have been a valid presentation.

Counsel for the respondent has referred the decision of Union of India Vs. M/s Popular Construction 2001 AIR SCW 3994 where the Apex Court has held to the following effect :-

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

Counsel for the appellant has referred the decision of M/s Transparent Peckers Vs. Arbitrary cum Managing Director and others J.T.2000 (7) SC 574 where the discretion with regard to condonation of delay has been exercised. The observations are quoted below:-

"We are not concerned with the merits of the controversy whether the application for condonation of delay should be allowed or not but dismissal of the application for condonation of delay on the ground of its alleged non-maintainability cannot be sustained. The impugned order of the High Court and that of the trial court are set aside. The application for condonation of delay filed in connection with the petition under Section 34 of the Arbitration and Conciliation Act, 1996 will now be considered by the trial court after hearing the parities on merits and in

accordance with law. The appeal is accordingly disposed of. No costs."

The petitioner has presented the petition well within time. The Civil Judge on 14.7.2000 has directed the petitioner to present before the appropriate court, which was not possible for the petitioner to have presented it within the period of limitation as according to the settled principles "*lex non cogit ad impassibilia"* reported in AIR 1993(1) SC 188, that law does not permit to do which he can not be possibly do. The observations are quoted below:-

"In the facts and circumstances of the case, the maxim of equity, namely, actus curiae neminem gravabit- an act of the Court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit and impossibilia- the law does not compel a man to do which he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by this Court in Raj Kumar Dey and others Vs. Trapada Dey and other. JT 1987(3) SC 555= [1987 (4) SCC 398] and Gursharan Singh and others Vs. NDMC and others JT 1996 (1) SC 647=[1996 (2) SCC 459]."

In view of the aforesaid, it was not possible for the petitioner to have presented within the period of limitation.

Apart from that the learned Civil Judge should have also forwarded the paper to the appropriate court, as the proceedings u/s 34 were initiated well within time.

The learned Civil Judge has observed that the application is barred by 23 days only and therefore, the presentation of the applicant was fully covered by the proviso to Sub-section (3) of Sec. 34 of the Arbitration and Conciliation Act 1996. It reads as under:-

> *"An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*
>
> *Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."*

The issue will have to be resolved with reference to the language used in Sections 29(2) of the Limitation Act, 1963 and Section 34 of the 1996 Act. Section 29 (2) provides that:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

In view of the aforesaid fact the appeal is allowed. The matter is sent back to the court below for deciding the case on merits.

Dt.27.8.2004 **(Rajesh Tandon, J.)**

M.K.